IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 31ST OCTOBER 2006 / 9TH KARTHIKA 1928

MFA.No. 658 of 2002(D)

WCC.110/1999 of W.C.C.,THRISSUR
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APPELLANT: 2ND OPPOSITE PARTY

THE MANAGER,THE ORIENTAL INSURANCE
COMPANY LIMITE4D,PALAKKAD,NOW REPRESENTED BY ITS
ASSISTANT MANAGER,REGIONAL OFFICE,METRO PALACE,
KOCHI-18

BY ADV. SRI.MATHEWS JACOB (SR.)

RESPONDENTS: APPLICANT

RAMESH S/O.PARAMESWARAN NAIR,
KOKKUTTIL HOUSE,KODUNTHIRAPALLY P.O.,
PALAKKAD.

BY ADV. SRI.M.V.HARIDAS MENON

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 31/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Thottathil B. Radhakrishnan, J.

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M.F.A.No.658 of 2002

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Dated this the 31st day of October, 2006.

JUDGMENT

This appeal is by the insurer challenging an award of the Commissioner for Workmen's Compensation.

2. It is noted in the impugned order that the disability and loss of earning capacity was assessed as 35 to 40%, when the profession of the claimant as a tempo cleaner is taken into account. The assessment of disability and the determination of loss of earning capacity, owing to a particular injury or disablement, are matters on which yardsticks are provided and recognised in the field of science as well as in law. An orthopaedician cannot merely say that disability and loss of earning capacity is between 35 to 40%. That would only be a guess work. Faced with such situation, the insurer applied to refer the claimant to the Medical Board. That request was turned down. Thereafter, the Commissioner acted on the disability certificate and assessed the compensation by assuming

that the loss of earning capacity could be treated as 30%.

3. The wounds noticed in Ext.A3 accident-cum-wound certificate, juxtaposed against the disability certificate, Ext.A6, ought to have led the Commissioner to conclude that loss of earning capacity of the claimant requires to be assessed by the Medical Board, particularly, when the loss of earning capacity is not referable exclusively to his avocation at the time of incurring the disablement. These issues are fairly covered by the two Full Bench decisions of this Court, **New India Assurance Co.Ltd. v. Sreedharan (1995 (1) K.L.T. 275) and Vanajakshan v. Joseph (2003 (2) K.L.T. 462)**. In the aforesaid circumstances, I am of the firm view that the impugned order is vitiated on a substantial question of law. The same requires to be reconsidered.

In the result, this appeal is allowed. The impugned order is vacated and the matter is remitted to the Commissioner with a direction to allow the request

of the insurer to send the claimant for examination by the Medical Board for ascertaining the loss of earning capacity in terms of the law laid in the decisions referred to above. It is further directed that, whatever be the decision of the Medical Board, the compensation that would be fixed by the Commissioner shall not be less than 50% of the amount covered by the impugned order. This direction is issued, particularly because, such amount has been released to the claimant, following the interim orders of this Court. It is further directed that after the determination of the matter finally, if any excess amount is continuing in deposit, the same shall be returned to the insurance company. The parties will appear before the Commissioner on 28-11-2006.

Thottathil B.Radhakrishnan,
Judge.

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Thottathil B. Radhakrishnan, J.

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M.F.A.No.658 of 2002

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JUDGMENT

Dated:31-10-2006